Chew Hon Keong v Betterproducts Industries Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 26NCC-58 OF 2010
MARY LIM J
30 JULY 2012

Civil Procedure — Judgments and orders — Consent order — Altering, varying or setting aside terms of consent order — Whether court functus officio upon making consent order — Whether term 'liberty to apply' in the order allowed for variation — Whether terms of consent order was estoppel by record — Whether courts have jurisdiction to vary, alter or amend an earlier consent order which has been perfected — Whatever variation required to implement and give effect to consent order and to resolve deadlock between parties

Pursuant to a petition founded on s 181 of the Companies Act 1965, a consent order was entered into between the parties. The consent order provided, inter alia, that: (a) an ex parte injunction dated 24 June 2010 was to be lifted and the first respondent permitted to continue its business as usual; (b) an independent accountant was to be jointly appointed within seven days from the date of the order to value the shares of the first respondent and the report to be presented within one month from the date of the order; (c) parties were at liberty to apply; and (d) time was of the essence. The petitioner claimed that the parties could not reach any consensus on the appointment of the independent accountant. Hence, the petitioner filed an application (encl 34) seeking an order that Mr Tee (a chartered accountant) be appointed as the independent valuer to conduct the valuation exercise on the first respondent. Enclosure 46 was the second and third respondents' application seeking to dissolve the consent order and to substitute those terms with an order that the first respondent be wound up. The issue which arose for determination was whether the court had jurisdiction to entertain the applications sought by the petitioner or the respondent. Counsel for the petitioner argued that the court had the necessary jurisdiction since one of the terms of the consent order was that the parties had 'liberty to apply' and this gave the court jurisdiction to grant orders for the purpose of implementing and giving effect to the consent order. Counsel for the respondent submitted that the court did not have jurisdiction to vary the terms of the consent order since it was an estoppel by record. The respondent further submitted that the court was functus officio upon making the consent order.

Held, allowing encl 34 and dismissing encl 46 with costs:

(1) Once a judgment has been properly and regularly drawn up and

perfected, that order cannot be altered, varied or set aside in the same action or by the same court except under the slip rule as found in O 20 r 11 of the Rules of the High Court 1980. Upon perfection of the order, the court is *functus officio*. Even another court of coordinate jurisdiction cannot do the same with regard to that order. The position is no different even where the order or its terms were procured by consent (see paras 16–17 & 19); *Hock Hua Bank Bhd v Sahari Bin Murid* [1981] 1 MLJ 143 referred; *Arab Malaysian Finance Berhad v Badiaddin Mohammad Mahidin & Anor* [1997] 1 CLJ 1 referred; *Tong Lee Hwa & Anor v Chin Ah Kwi Tong Chong Fah v Chin Ah Kwi* [1971] 2 MLJ 75 referred.

(2) However, the courts do not decline revisits to an earlier order made, especially one made by itself, simply on the basis of no jurisdiction. The first rule, of course, is that once perfected, a proper order is not to be varied, altered or amended. It remains closed unless, in the circumstances the jurisdiction exercised by the court is justified. In determining whether the circumstances warrant a second look at the terms of the order, including one reached by consent, the terms and the conduct of the parties are relevant considerations (see paras 36–37); *Ganapathy Chettiar v Lum Kum Chum & Ors Meenachi v Lum Kum Chum & Ors* [1981] 2 MLJ 145 referred.

(3) The phrase, 'liberty to apply', is a term agreed between the parties giving themselves an opportunity to approach the court again on matters relating to or for the purpose of implementing and giving effect to the order. The parties had reserved for themselves the liberty to apply or to approach the court for further orders or directions. Before the court can do so, there must be sound reasons which justify such intervention (see para 37); *Leong Ah Weng v Neoh Thean Soo & Anor* [1983] 2 MLJ 19 referred.

(4) The parties were at a deadlock on the appointment of an independent accountant and the manner in which the valuation was to be done. Under the terms of the consent order, the appointment of the independent accountant had to be made on or before 13 July 2010 (see paras 45–46).

(5) Considering that the accord was reached in the atmosphere of a settlement by mediation which was assisted by the court, it was reasonable to conclude that it was precisely for circumstances such as those presented that an express provision for a 'liberty to apply' was incorporated. Such a term assured the parties that they could approach the court to deal with any matter arising from the implementation of the terms of the consent order. Given the facts and circumstances of the case, the court could not be said to be powerless to compel compliance of the parties to the bargain that they had agreed upon in the consent order (see para 48).

(6) The terms of the consent order were still capable of implementation. The orders sought by the petitioner were largely consistent with the terms of the consent order as opposed to those sought by the respondents. What the court was asked to do was to unlock the deadlock that the parties were at in terms of the time compliance and the appointment of the independent accountant so that the dispute between them could be finally concluded (see para 49).

(7) The court could not agree with encl 46 because the orders would go outside the purpose and meaning of 'implementation and giving effect' to the terms of the consent order. What distinguished encl 34 from encl 46 was that encl 46 sought in effect, a '*rehearing or reopening of the case*'. That order was closed to the respondents in view of the consent order (see paras 51–52).

[Bahasa Malaysia summary

Menurut satu petisyen yang diasaskan berdasarkan s 181 Akta Syarikat 1965, satu perintah persetujuan telah dimeterai antara pihak-pihak. Perintah persetujuan memperuntukkan, antara lainnya, bahawa: (a) satu injunksi ex parte bertarikh 24 Jun 2010 ditarik balik dan responden pertama dibenarkan untuk meneruskan perniagaannya seperti biasa; (b) seorang akauntan bebas perlu dilantik secara bersama dalam jangkamasa tujuh hari daripada tarikh perintah untuk menilai saham-saham responden pertama dan laporan tersebut akan dibentangkan dalam tempoh sebulan daripada tarikh perintah tersebut; (c) pihak-pihak bebas untuk memohon; dan (d) masa adalah intipati. Pempetisyen mendakwa bahawa pihak-pihak tidak dapat mencapai kata sepakat mengenai perlantikan akauntan bebas. Oleh itu, pempetisyen memfailkan permohonan (lampiran 34) memohon satu perintah bahawa Encik Tee (seorang akauntan bertauliah) dilantik sebagai penilai bebas untuk menjalankan tugas penilaian ke atas responden pertama. Lampiran 46 merupakan permohonan responden kedua dan ketiga untuk membubarkan perintah persetujuan dan menggantikan terma-terma tersebut dengan satu perintah bahawa responden pertama digulungkan. Isu yang timbul untuk ditentukan ialah sama ada mahkamah mempunyai bidang kuasa untuk melayan permohonan-permohonan yang dipohon oleh pempetisyen atau responden. Peguam cara bagi pihak pempetisyen menghujah bahawa mahkamah mempunyai bidang kuasa yang diperlukan memandangkan satu daripada terma-terma perintah persetujuan ialah pihak-pihak mempunyai 'kebebasan untuk memohon' dan ini memberikan mahkamah bidang kuasa untuk memberikan perintah-perintah bagi tujuan melaksanakan dan memberikan kuasa kepada perintah persetujuan. Peguam cara bagi pihak responden menghujah bahawa mahkamah tidak mempunyai bidang kuasa untuk mengubah terma-terma perintah persetujuan memandangkan ia merupakan satu estopel melalui rekod. Responden seterusnya menghujah

bahawa mahkamah adalah *functus officio* daripada membuat perintah persetujuan.

Diputuskan, membenarkan lampiran 34 dan menolak lampiran 46 dengan kos:

(1) Apabila satu penghakiman telah disediakan secara betul dan diputuskan secara kerap dan disempurnakan, perintah tersebut tidak boleh diubah atau diketepikan dalam tindakan yang sama atau oleh mahkamah yang sama melainkan di bawah kaedah khilaf seperti yang didapati dalam A 20 k 11 Kaedah-Kaedah Mahkamah Tinggi 1980. Selepas perintah tersebut disempurnakan, mahkamah adalah *functus officio*. Malah mahkamah lain yang mempunyai bidang kuasa yang sama tidak dapat melakukan perkara yang sama berhubung perintah tersebut. Kedudukan ini tidak berubah walaupun dalam keadaan perintah atau terma-termanya didapati melalui persetujuan (lihat perenggan 16–17 & 19); *Hock Hua Bank Bhd v Sahari Bin Murid* [1981] 1 MLJ 143 dirujuk; *Arab Malaysian Finance Berhad v Badiaddin Mohammad Mahidin & Anor* [1997] 1 CLJ 1 dirujuk; *Tong Lee Hwa & Anor v Chin Ah Kwi Tong Chong Fah v Chin Ah Kwi* [1971] 2 MLJ 75 dirujuk.

(2) Walau bagaimanapun, mahkamah tidak menolak untuk melihat kembali perintah awal yang dibuat, terutamanya yang dibuat oleh mahkamah sendiri, semata-semata atas dasar tiada bidang kuasa. Prinsip pertama semestinya ialah apabila perintah telah disempurnakan, ia tidak boleh diubah atau dipinda. Ia kekal tertutup melainkan, dalam keadaan bidang kuasa yang dijalankan oleh mahkamah adalah wajar. Dalam menentukan sama ada keadaan tersebut membolehkan terma-terma perintah dilihat buat kali kedua, termasuklah yang diputuskan melalui persetujuan, terma-terma dan tindakan pihak-pihak merupakan pertimbangan-pertimbangan yang relevan (lihat perenggan 36–37); *Ganapathy Chettiar v Lum Kum Chum & Ors Meenachi v Lum Kum Chum & Ors* [1981] 2 MLJ 145 dirujuk.

(3) Frasa, 'bebas untuk memohon', merupakan satu terma yang dipersetujui di antara pihak-pihak yang memberikan peluang kepada diri mereka untuk ke mahkamah sekali lagi mengenai perkara-perkara berhubung kepada atau melaksanakan dan memberikan kuasa kepada perintah tersebut. Pihak-pihak telah memberikan diri mereka kebebasan untuk memohon atau pergi ke mahkamah untuk perintah atau arahan-arahan selanjutnya. Sebelum mahkamah boleh berbuat demikian, perlulah ada alasan-alasan kukuh yang mewajarkan campur tangan tersebut (lihat perenggan 37); *Leong Ah Weng v Neoh Thean Soo & Anor* [1983] 2 MLJ 19 dirujuk.

(4) Pihak-pihak buntu dengan perlantikan seorang akauntan bebas dan cara penilaian seharusnya dibuat. Di bawah terma-terma perintah

persetujuan, perlantikan akauntan bebas perlu dibuat pada atau sebelum 13 Julai 2010 (lihat perenggan 45–46).

(5) Dengan mempertimbangkan bahawa perjanjian telah dicapai dalam suasana penyelesaian melalui pengantaraan yang dibantu oleh mahkamah, maka adalah munasabah untuk memutuskan bahawa untuk keadaan-keadaan seumpama dengan apa yang dibentangkan ini yang menjadikan peruntukan tersurat untuk satu 'kebebasan untuk memohon' dibuat. Terma tersebut meyakinkan pihak-pihak bahawa mereka boleh ke mahkamah untuk menyelesaikan perkara lain yang timbul daripada perlaksanaan terma-terma perintah persetujuan. Berdasarkan fakta-fakta dan keadaan-keadaan kes, mahkamah tidak boleh dikatakan tidak mempunyai kuasa untuk memaksa pihak-pihak mematuhi apa yang dipersetujui oleh mereka dalam perintah persetujuan (lihat perenggan 48).

(6) Terma-terma perintah persetujuan masih boleh dijalankan. Perintah-perintah yang dipohon oleh pempetisyen adalah sebahagian besarnya konsisten dengan terma-terma perintah persetujuan berbanding apa yang dipohon oleh responden-responden. Apa yang mahkamah diminta untuk melakukan ialah untuk menyelesaikan kebuntuan yang dialami oleh pihak-pihak berhubung pematuhan masa dan perlantikan akauntan bebas supaya pertikaian di antara mereka akhirnya boleh diputuskan (lihat perenggan 49).

(7) Mahkamah tidak boleh bersetuju dengan lampiran 46 kerana perintah-perintah tersebut akan berada di luar tujuan dan maksud 'perlaksanaan dan memberikan kesan' kepada terma-terma perintah persetujuan. Apa yang membezakan lampiran 34 daripada lampiran 46 ialah lampiran 46 memohon kesan, satu '*pendengaran semula atau pembukaan semula kes*'. Perintah tersebut tertutup kepada responden-responden menurut perintah persetujuan (lihat perenggan 51–52).]

Notes

For cases on consent order, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 4812–4834.

Cases referred to

Abdul Rashid bin Maidin & Ors v Lian Mong Yee [2008] 1 MLJ 469; [2008] 1 CLJ 1, CA (refd)

Arab Malaysian Finance Berhad v Badiaddin Mohammad Mahidin & Anor [1997] 1 CLJ 1, CA (refd)

Gai Hin Refrigeration Sdn Bhd v Kamanis Holdings Sdn Bhd [2005] 1 MLJ 57; [2004] 4 CLJ 232, CA (refd)

Ganapathy Chettiar v Lum Kum Chum & Ors; Meenachi v Lum Kum Chum & Ors [1981] 2 MLJ 145, FC (refd)
Hock Hua Bank Bhd v Sahari Bin Murid [1981] 1 MLJ 143, FC (folld)
Kanawagi s/o Seperumaniam v Penang Port Commission [2001] 5 MLJ 433, HC (folld)
Leong Ah Weng v Neoh Thean Soo & Anor [1983] 2 MLJ 119, FC (refd)
Mayban Allied Bhd (formerly known as Phileo Allied Bank (M) Bhd) v Kenneth Godfrey Gomez & Anor [2011] 5 MLJ 219; [2010] 9 CLJ 702, CA (refd)
Tenaga Nasional Bhd v Prorak Sdn Bhd & Anor [2000] 1 MLJ 479, CA (folld)
Tong Lee Hwa & Anor v Chin Ah Kwi Tong Chong Fah v Chin Ah Kwi [1971] 2 MLJ 75, FC (refd)

Legislation referred to

Companies Act 1965 s 181
Malay Reservation Enactment (FMS Cap 142) s 7
Penang Port Commission Act 1995
Rules of the High Court 1980 O 20 r 11

Ramesh K Supramaniam (Velvashini Vembarasan with him) (George Varughese) for the petitioner.
Gan Khong Aik (Gan Partnership) for the second and third respondents.

Mary Lim J:

APPLICATIONS

[1] There are three applications for disposal: encls 1, 34 and 46. However, encl 1 has already been disposed of, on 6 July 2009 to be precise. On that date, the parties recorded terms which can be found in what is referred to as a consent order ('consent order').

[2] Enclosure 34 is the petitioner's application. According to the affidavit of the petitioner filed in support of the application, he is seeking an order that Mr Tee Guan Pian, a chartered accountant be appointed as the 'said independent valuer' to conduct the valuation exercise on the first respondent and Utamas Prestasi Sdn Bhd. He also proposed that:

(a) Mr Tee was to then prepare and submit a written valuation report to ascertain the value of the shares mentioned in the consent order within three months from the date of the order;

(b) the valuation report prepared by Mr Tee then becomes the basis for the settlement and compliance of the consent order; and

(c) Mr Tee was to conduct the valuation on the basis of the said companies as a going concern.

[3] Alternatively, the petitioner sought an order that Mr Tee be at liberty to independently employ the valuation methods he deems fit for the preparation of the written report; that Mr Tee be given access to all documents which he deemed necessary for the purposes of carrying out the said valuation; and finally that costs and expensed of preparing the valuation report be paid by the first respondent.

[4] Enclosure 46 is the second and third respondents' application. In this application, the respondents seek to rescind or dissolve that consent order insofar as the first three terms of the consent order is concerned. Further, they seek to substitute those terms with an order that the first respondent is to be wound-up and a liquidator be appointed to manage the affairs relating to the liquidation of the first respondent.

THE CONSENT ORDER

[5] It makes good sense to start with the terms of the consent order of 6 July 2010. The order reads as follows:

> THIS ACTION having been fixed for Mediation today in the presence of Mr. James Dominic Culaz the Petitioner's solicitors and Mr. Gah Khong Aik solicitors for the Second and Third Respondents, Mr. Kiu Jia Yaw and Miss Teh Lay Kheng solicitors for the 4th Respondent and also in the presence of the Petitioner and the Second Respondent AND IT IS HEREBY ORDERED BY CONSENT that —
>
> (1) The Petitioner and the 2nd Respondent have agreed to uplifted the Ex-parte injunction dated 24th June 2010 and permit the 1st Respondent to continue to carry on the operations and business as usual in the manner prior to the granting of the Ex-parte injunction with the Petitioner and the 2nd Respondent being the only signatories to all bank accounts of the 1st Respondent Company subject to an Independent Accountant to be jointly appointed WITHIN SEVEN (7) DAYS from the date hereof to value the shares of the 1 Respondent and Utamas Prestasi Sdn Bhd of their worth as at 30th April 2010 and the said Report shall be presented within one (1) month hereof.
>
> (2) It is further agreed by the Parties that upon the aforesaid valuation of the Companies by the Independent Accountant, the 2nd Respondent shall purchase the Petitioner's 50% stake in both the 1st Respondent and Utamas Prestasi Sdn Bhd respectively based on the Valuation Report prepared by the said Independent Accountant and the said purchase price for the shares shall be paid within three (3) months from the date of the Valuation Report and the Petitioner shall transfer the said shares in the 1st Respondent and the shares in Utamas Prestasi Sdn Bhd held through his nominee Yong Hiok Wong to the 2nd Respondent and/or his nominee(s).
>
> (3) All the assets of the 1st Respondent shall remain as is where is (status quo) pending completion of the valuation including the four (4) sets of

injection cavity moulds which are currently kept in the premises of Soon Lee Plastic Industry Sdn Bhd. the outstanding rental is to be borne by Utamas Prestasi Sdn Bhd.

(4) Parties are at liberty to apply.

(5) No order as to costs.

(6) Time is of the essence.

THE JURISDICTION OF THE COURT

[6] The first issue surely must be whether the court has any jurisdiction to entertain the applications sought, be it by the petitioner or the respondent.

THE SUBMISSIONS OF COUNSEL

[7] Learned counsel for the petitioner argued that the court had the necessary jurisdiction to hear and make the orders sought. In the petitioner's application found in encl 34, the petitioner claimed that the parties 'are at a deadlock to reach a consensus on the appointment of an independent accountant and the manner in which the valuation' of the shares in the first respondent and Utamas Prestasi Sdn Bhd were to be effected. The petitioner claimed that the parties had much difficulty in reaching any consensus on the appointment of the independent accountant with the second respondent insisting on valuing the companies on the basis that they must be dormant.

[8] One of the terms of the consent order was that the parties had 'liberty to apply'. This gave the court jurisdiction to grant the orders presently sought for the purpose of implementing and giving effect to the consent order. Further, it was alleged that the second respondent failed to give co-operation to allow access to the documents of the relevant companies. The application was said to be 'necessary for there to be a conclusion to this dispute and for parties to be held to their bargain as agreed upon by the terms of the said consent order'.

[9] Learned counsel for the respondent disagreed. He submitted that the court did not have jurisdiction to vary the terms of the consent order in the manner sought. He said that 'an order by consent is evidence of the contract between the parties and is binding on the parties to the order. It also operates as a judgment and acts as an estoppel by records'. In other words, the terms of the consent order must be kept. Learned counsel argued that the orders sought by the petitioner departed from the terms of the consent order. If granted, it will have the effect of forfeiting the second respondent's rights to jointly appoint the independent accountant as agreed in the consent order.

[10] The respondent further submitted that the petitioner had to file a fresh action for the orders presently sought because the court was *functus officio*. When the parties entered into the consent order, the petitioner's cause of action in the petition was said to be 'fully extinguished and no further application of a fresh and substantial nature can be made by the petitioner as there was no live issue to be determined'.

[11] Lastly, it was submitted that the petitioner was not entitled to rely on the 'liberty to apply' clause in the consent order for the orders now sought. That term was only for the purpose of working out the actual terms of the consent order and not to vary or alter the terms of the consent order. There was no intention on the part of the parties to revert to court in the event of a deadlock. If that was the intention, then there would have been a provision for this in the consent order. In any case, it was submitted that there was no deadlock. It was the petitioner who was in breach or who had repudiated the terms of the consent order. The court should not be used by the indolent such as the petitioner.

[12] The second and third respondents' application found at encl 46 is to rescind or dissolve the first three terms of the consent order, and to substitute those terms with an order to wind up the first respondent. According to the affidavit filed in support of the application, this was brought about by the non-compliance of the time is of the essence term in the consent order. Since the second respondent's intent was to see completion of the sale and purchase of the said shares within four months from the date of the consent order, the lapse of more than a year from that date meant that the sale and purchase could no longer be completed. In turn, that had compromised the intent and consideration of the second respondent's agreement to purchase the relevant shares. It was said that it was no longer suitable or reasonable to proceed with the sale and purchase of the shares concerned. In such circumstances, it was more just and suitable that the first respondent be wound up.

THE FINDINGS

[13] After careful and anxious consideration of the submissions of both learned counsel, and upon reading and evaluating the applications, affidavits and counter or reply affidavits filed in relation to both applications, I allowed prayers (a)–(b)(i) and (ii) only of encl 34; and dismissed encl 46. I further ordered costs of RM5,000 for both applications to the petitioner. These are my reasons in full.

[14] First and foremost, I must point out that encl 1 which is a petition founded on s 181 of the Companies Act 1965 is not available for consideration. This is because it has already been disposed of. On 6 July 2010, the parties

reached a settlement of the petition and recorded terms by consent. That consent order was arrived at by process of mediation. All parties involved in the petition had attended the mediation. In fact, some even attended in person despite legal representation. This is in keeping with mediation proceedings where as a rule of thumb, the litigants themselves or the decision-makers involved in the claim before the court must personally attend the mediation.

[15] The second observation is the matter of the parties to the consent order. Although the terms of the consent order placed slightly more emphasis on the petitioner and the first and second respondents in respect of the actions to be taken by each of them, by no means are the other respondents excluded. This can be seen from the clear terms of the consent order where it is stated that: 'It is further agreed by the *Parties*'; and '*Parties* are at liberty to apply' (Emphasis added.). This obviously included parties other than the petitioner and the first two respondents.

[16] Moving then to the main issue concerning the court's jurisdiction to deal with the two applications presented. It must be borne in mind that once a judgment has been properly and regularly drawn up and perfected, that order cannot be altered, varied or set aside in the same action or by the same court except under the slip rule as found in O 20 r 11 of the Rules of the High Court 1980. The reason for this was explained by the Federal Court in *Hock Hua Bank Bhd v Sahari Bin Murid* [1981] 1 MLJ 143. At p 144, the Federal Court addressed this as a matter of jurisdiction or power; that '… the court has no power under any application in the same action to alter vary or set aside a judgment regularly obtained after it has been entered or an order after it is drawn up, …' Upon perfection of the order, the court is functus officio. Even another court of coordinate jurisdiction cannot do the same with regard to that order.

[17] This approach was adopted by the Court of Appeal in *Arab Malaysian Finance Berhad v Badiaddin Mohammad Mahidin & Anor* [1997] 1 CLJ 1, which cited the Federal Court's decision in *Hock Hua Bank Bhd v Sahari* and similarly opined that:

> It is settled law that one High Court cannot set aside a final order of another High Court, let alone its own final order.

[18] Since then, this principle has been consistently recanted in a long line of authorities from the appellate courts. See for example the Court of Appeal's decisions in *Gai Hin Refrigeration Sdn Bhd v Kamanis Holdings Sdn Bhd* [2005] 1 MLJ 57; [2004] 4 CLJ 232, *Abdul Rashid bin Maidin & Ors v Lian Mong Yee*

[2008] 1 MLJ 469; [2008] 1 CLJ 1, and *Mayban Allied Bhd (formerly known as Phileo Allied Bank (M) Bhd) v Kenneth Godfrey Gomez & Anor* [2011] 5 MLJ 219; [2010] 9 CLJ 702.

[19] The position is no different even where the order or its terms were procured by consent — see *Tong Lee Hwa & Anor v Chin Ah Kwi Tong Chong Fah v Chin Ah Kwi* [1971] 2 MLJ 75. In fact, where the order was by consent, the Federal Court in *Ganapathy Chettiar v Lum Kum Chum & Ors; Meenachi v Lum Kum Chum & Ors* [1981] 2 MLJ 145, said that '… an order by consent is evidence of the contract between the parties and is binding on all parties to the order'. This was reiterated by the Court of Appeal in *Gai Hin Refrigeration Sdn Bhd v Kamanis Holdings Sdn Bhd* at p 58 (MLJ); p 238 (CLJ). In *Mayban Allied Bhd v Kenneth Godfrey Gomez & Anor & Another Appeal* at p 227 (MLJ); p 711 (CLJ), the Court of Appeal further opined that:

> Once the appellant and the respondents took the matter beyond contract and recorded a consent order then they must accept all the implications of a court judgment or order. In this sense the court now cannot vary the terms of the order.

[20] In other words, regardless of the fact that the terms of a court order were arrived at by consent, that consent order is nevertheless a judgment of the court which has every force of law.

[21] However, a careful scrutiny of these decisions will reveal that neither the Federal Court nor the Court of Appeal is saying that the orders can never ever be revisited. An examination of the facts of some of these cases will illustrate this.

[22] These were the facts in *Hock Hua*. The first instance court had made the order of sale in foreclosure proceedings after hearing both sides on 13 June 1978 on a claim of *non est factum* and allegations of fraud and forgery by the respondent. The cause papers were served on the chargor together with the requisite documents under the Land Code. The charge was to secure repayment of a loan made to a firm. The chargor appeared to have executed the charge before an advocate and solicitor practicing in Miri. The respondent filed an affidavit denying that he had executed the charge on the day claimed as he was out at sea at the material time. The learned judge's order was drawn up and perfected. There was no appeal. But, just before expiry of the period for lodging an appeal, the respondent filed an application to set aside the order and for leave to file an affidavit in opposition. Upon hearing, the application was dismissed on 26 September 1978. A second application to set aside the two previous orders was then made, precisely on the same grounds. Again, affidavits and counter-affidavits were filed. This time, the court allowed the application and on 18 December 1979, the court set aside its earlier order. It was in these

circumstances that the Federal Court disapproved the setting aside of the previous orders by the High Court and in the process, made those strong observations.

[23] The facts were also peculiar in *Arab Malaysian Finance Berhad v Badiaddin Mohammad Mahidin & Anor*. The respondents had entered into a joint venture with one Ismail Omar to develop lands that they held under Malay Reservation. Ismail Omar applied for funds for the joint venture using the land as security. Unfortunately, the appellant was not competent to hold the mortgage over the land as it was not considered to be a 'Malay' or a 'Malay holding'. Under s 7 of the Malay Reservation Enactment (FMS Cap 142), only a Malay or gazetted Malay holding is capable of holding Malay Reservation land. The joint venture failed and Ismail Omar defaulted. The appellant commenced proceedings to recover the money owed. In the meantime, the respondents applied for a declaration that the mortgage held by the appellant was invalid by virtue of s 7 of the Malay Reservation Enactment.

[24] On 21 March 1988, the first learned judge granted several orders which included an order that 'party be at liberty to apply in order to execute the above orders':

(a) the mortgage was invalid;

(b) the order by the Land Administrator Tampin given to the appellant for the sale of the land was also invalid;

(c) the land administrator is ordered to cancel the entry of the mortgage;

(d) the applicants (now the respondents) shall return all monies delivered them by the appellant;

(e) the applicants are prohibited from dealing with the land as long as the loan remains unpaid; and

(f) either party be at liberty to apply for an order to execute the above orders.

[25] On 8 October 1990, the appellant applied and was granted an order that the land be sold either by public auction or private treaty:

(a) a declaration that the respondents had in fact received the loan or the facility from the appellant;

(b) the respondents jointly and/or severally repay the appellant a sum of RM300,000 together with interest thereon and alternatively;

(c) the land be sold by public auction or private treaty; and

(d) the proceeds of sale to be utilised to pay the RM300,000 with interest.

[26] The respondents were unhappy with that order and appealed to the Supreme Court. That appeal was struck off on the ground that no prior leave had been sought. Instead of making a fresh application for leave with all consequential orders, the respondent made a fresh application before the High Court to declare a part of the order made on 8 October 1990 as invalid.

[27] The application was heard by a different judge who proceeded to grant the application. A part of the earlier order was then set aside. It is in that context that the Court of Appeal remarked that:

> … we would have thought that the proper course for the respondents to adopt, if they find themselves unhappy with that order, would be to appeal to the then Supreme Court, as at that time that was the only court that could declare as being invalid or otherwise any order of the High Court.

[28] The Court of Appeal further said that 'clearly the order of 8 October 1990 is a final order of the Seremban High Court. Therefore that order cannot be altered, varied or set aside by the same court even though presided over by another judge. Nor does it come under the provision of O 20 r 11 of the Rules of the High Court 1980. The only recourse is to appeal to a higher court which has jurisdiction to pronounce the validity or otherwise of 8 October 1990 order. … The order given … is, to our mind invalid and ought to be set aside'.

[29] Even the facts in *Ganapathy Chettiar v Lum Kum Chum & Ors* were quite unusual. That case actually involved two appeals. One by Ganapathy, the other by Meenachi. They were registered co-proprietors of a piece of land. What had happened is that one of them had applied to sell the land by public auction. A consent order was drawn up on 19 June 1973 and then perfected. Amongst the consequential summons for directions, as amended, was the fixing of a reserve price and a liberty to apply. The sale was aborted. Lum Kum Chum who was the first respondent in the High Court applied for the public auction to be withdrawn and the parties be at liberty to sell their shares by private treaty. The two appellants who were the second and third respondents in the High Court wanted to proceed with the public auction but alternatively asked to sell their shares by private treaty.

[30] At the hearing of the applications, counsel who was then representing the both appellants (as second and third respondents) informed the court that one of his clients wanted to withdraw the prayer for sale by private treaty. The court refused and an order was made allowing the parties to sell their shares by private treaty. It was from this order that two appeals ensued. One by Meenachi, the respondent who had voiced her objections at the time of hearing; the other by Ganapathy who did not.

[31] In arriving at its decision, at p 146, the Federal Court said:

> The order now appealed from obviously varied from the consent order. The appeal was therefore grounded almost entirely on the jurisdiction of the court to vary an order which it had made and which had been drawn up and perfected. The question is whether in the circumstances the jurisdiction exercised by the court can be justified. The answer to the question is obvious and, with respect is so clearly stated … that an order by consent is evidence of the contract between the parties and is binding on all the parties to the order. It may be pleaded as estoppel: *Kinch v Walcott*. All the more so, in our view, since there is not the slightest question of any mistake as to facts or law.

[32] It will be seen that the Federal Court took pains to examine the facts and the conduct of the respective parties before making its conclusions. After finding that there was no mistake on the part of anyone when the consent order was made, the Federal Court held that the 'only possible way in which this order could be altered would be by consent of all the parties'. At the time of the appeals, Lum Kum Chum and the respondents had already sold their shares in the land by private treaty in anticipation of the consent of the appellants. The transfers had been executed. It was against these facts that the court made the remarks set out above and further expressed that 'it was too late' for the appellants to withdraw their prayer.

[33] It will be observed that the consent order in this case was in fact revisited. Despite the initial terms being for a sale by public auction and one of the appellants still wanting to proceed by such mode, those terms were allowed to be withdrawn and the court ordered the sale by private treaty.

[34] This was the similar approach of the Court of Appeal in *Gai Hin Refrigeration Sdn Bhd v Kamanis Holdings Sdn Bhd*. When the case came up for continued hearing on 20 September 1996, it was stood down for settlement by the parties. Together with their respective counsel, the parties agreed on terms of settlement and a consent judgment was recorded. Amongst the terms agreed were terms on the imposition of interests. On 7 October 1996, the respondent filed an application to set aside the consent judgment. The application was dismissed on 29 September 1997. However, the learned judge varied the consent order and disallowed one of the agreed terms on interest.

[35] The Court of Appeal found that the High Court was right in dismissing the application to set aside the order which had already been perfected. The court applied Hock Hua Bank Bhd, that the court was functus officio and had no power 'to alter, vary or set aside a judgment as he had no jurisdiction under the application to do so, except under the slip rule'.

[36] From all these decisions, it can be safely concluded that the courts do

not decline revisits to an earlier order made, especially one made by itself, simply on the basis of no jurisdiction. The first rule, of course, is that once perfected, a proper order is not to be varied, altered or amended. It remains closed unless, of course, 'in the circumstances the jurisdiction exercised by the court is justified' — per Raja Azlan Shah CJ (as His Highness then was) in *Ganapathy Chettiar*, p 146.

[37] In determining whether the circumstances warrant a second look at the terms of the order, including one reached by consent, the terms and the conduct of the parties are relevant considerations. The provision of a 'liberty to apply' suggests that parties have expressly reserved their right to return to court for either further orders or directions. This phrase, 'liberty to apply', is a term agreed between the parties giving themselves an opportunity to approach the court again on matters relating to or for the purpose of implementing and giving effect to the order. The Federal Court in *Leong Ah Weng v Neoh Thean Soo & Anor* [1983] 2 MLJ 119 explained what this phrase meant:

> … all orders of court carry with them in gremio liberty to apply to the court (*Fritz v Hobson*) (at p 561 per Fry J) as this is implied without it being expressly reserved (*Societe des Etains de Bayas Tudjub v Who Heng Mining Kongsi, Sungei Biak Tin Mines Ltd v Saw Choo Theng & Anor (No 2)*.
>
> The meaning of 'liberty to apply' has been eloquently defined by Jenky J in the Supreme Court of New South Wales, Family Law division in the exercise of Federal jurisdiction in the case of *Nicholson v Nicholson*, ALR Vol 4 1997 p 212 at 216 where His Lordship said:
>
> > 'Liberty to apply' is simply a device by which further orders may be made when necessary for the purpose of implementing and giving effect to the principal relief already pronounced, see *Christel v Christel* [1951] 2 KB 725.
>
> In *Christel v Christel* [1951] 2 KB 725 at 730 Sommerville LJ said:
>
> > '… As I have said, prima facie the words 'Liberty to apply' refer, in my opinion, to the working out of the actual terms of the order.

[38] In *Kanawagi s/o Seperumaniam v Penang Port Commission* [2001] 5 MLJ 433, the court found that the declaratory order made by the court on 18 July 1994 had not been given effect by the defendant. The order being that the defendant's action in terminating the services of the plaintiff was ultra vires the Penang Port Commission Act 1995. That being so, the termination was null, void and invalid. Apart from this declaratory order, the court granted an order that damages sustained by the plaintiff be assessed by the deputy registrar. Despite this order, the defendant refused to reinstate the plaintiff.

[39] The plaintiff then sought consequential reliefs for him to be reinstated

and be paid his salaries and all other emoluments and allowances from the date of the court's order. This was strongly resisted with the defendant contending, inter alia, that the plaintiff was 'reopening' his case and because of the doctrine of election as the plaintiff had received damages.

Alternatively, the defendant argued that the plaintiff was estopped by approbation and reprobation in seeking reinstatement.

[40] Relying on the Court of Appeal's decision in *Tenaga Nasional Bhd v Prorak Sdn Bhd & Anor* [2000] 1 MLJ 479, the court took issue with the defendant who 'did not want to reinstate the plaintiff then they should have appealed against the decision of Anuar J (as he then was) given on 18 July 1994, and not choose this forum to lodge an attack on that decision, which is now final and can be given effect'. The court then proceeded to consider the plaintiff's application, finding that the plaintiff was not reopening his case nor varying, altering or amending the order first made on 18 July 1994. At p 454, the court said:

> This present action arises as a result of the defendant's obstinate disobedience to give effect to that order made on 18 July 1994 that the plaintiff is compelled to seek consequential orders to give effect to it. Therefore, this case is not to reopen and/or vary, alter or amend the order made by court on 18 July 1994 to attract the rule of res judicata and corollary to it, the rule of issue of estoppel and functus officio.

[41] In the present facts, the parties have indeed reserved for themselves the liberty to apply or to approach the court for further orders or directions. As held by the Federal Court in *Leong Ah Weng v Neoh Thean Soo & Anor*, this right to do so was implicit in every order anyway. However, in dealing with such applications, the court's powers are somewhat restrained when compared to the first occasion for obvious reasons. This time, there are terms before the court which the court is being invited to revisit. Before the court can do so, there must be sound reasons which justify such intervention.

[42] The first term in the consent order concerned the uplifting of the ex parte injunction dated 24 June 2010 and permitting 'the first respondent to continue to carry on the operations and business as usual in the manner prior to the granting of the ex parte injunction with the petitioner and the second respondent being the only signatories to all bank accounts of the first respondent'. These two parts of the first term in the consent order has already been implemented.

[43] While that has proceeded well, the condition of that uplifting has not. The parties were supposed to jointly appoint an independent accountant within seven days from the date of the consent order. That independent accountant was 'to value the shares of the first respondent and Utamas Prestasi

Sdn Bhd of their worth as at 30 April 2010' and to present a 'report …within one month hereof. That report was then to form the basis for the purchase by the second respondent of the petitioner's shares in the first respondent and a company known as Utamas Prestasi Sdn Bhd. According to the petitioner, why the parties have not moved past the uplifting of the injunction was because of the parties' difficulty in reaching any consensus on the appointment of the independent accountant and on the matters identified in the consent order.

[44] From the affidavits filed and the correspondence exchanged between the parties, I agree with the petitioner. I also agree with the petitioner that 'without being petty and going back and forth on who is right', it is obvious that the parties are at a deadlock on the appointment of an independent accountant and the manner in which the said valuation is to be done. Both sides had offered each other their respective choices but were unable to agree on a common choice. Hence, their stalemate or deadlock. The parties have again offered their respective choices today.

[45] I further agree with the petitioner that the parties are at a deadlock over the appointment of the independent accountant within the time-frame envisaged under the terms of the consent order. I appreciate that the parties had incorporated a 'time is of the essence' term as part of its terms. But, the conduct of the parties, in particular that of the respondents, does not reflect conduct consistent with the intention of making time be of the essence of their consent order.

[46] Under the terms of the consent order dated 6 July 2010, the appointment of the independent accountant had to be made on or before 13 July 2010. However, the correspondence presented in court showed that both parties did not get round to discussing the matter of the appointment until 13 July 2010 itself. Although the respondents were aware that time was of the essence, as reflected in their solicitors' letters to the petitioner's solicitors, their actions nevertheless do not reflect any sense of urgency or importance to that condition. On the contrary, the respondents were prepared to wait for the appointment despite the fact that the date for such appointment had long past. From the respondents' conduct, it is reasonable to conclude that the time for compliance was no longer of the essence.

[47] The court cannot ignore all these efforts of both parties. Such efforts are in fact the parties' endeavors towards implementation of the terms of the consent order. Unfortunately, the parties have run into practical problems. The solutions for such problems were not provided for in the terms of the consent order. That is not to be unexpected as more often than not, it is the substantive matters that are incorporated as part of the terms of a consent order. When

drawing up terms of settlement for consent of the parties, the parties are generally looking at resolution and not drafting with an anticipation that the settlement will fail or is bound to fail.

[48] Considering that the accord was reached in the atmosphere of a settlement by mediation which was assisted by the court, it is reasonable to conclude that it is precisely for circumstances such as those presented today that an express provision for a 'liberty to apply' was incorporated. Such a term assured the parties that they could approach the court to deal with any matter arising from the implementation of the terms of the consent order. Given the facts and attendant circumstances of this case, the court cannot also be said to be powerless to compel compliance of the parties to the bargain that they had agreed upon in the consent order. As said in *Kanawagi s/o Seperumaniam*, p 468, '… the court is *lex non deficit in justitia exhibenda* which in simple English means that the law does not fail in dispensing justice'.

[49] From the evidence presented, I am of the view that the terms of the consent order are still capable of implementation and given effect to. The orders sought by the petitioner are largely consistent with the terms of the consent order as opposed to those sought by the respondents. What the court has been asked to do is to unlock the deadlock that the parties were at in terms of the time compliance and the appointment of the independent accountant so that the dispute between them can be finally concluded.

[50] It is for those reasons that only prayers (a)–(b)(i) and (ii) of encl 34 are granted. These orders will facilitate the parties towards the full implementation of the accord that they had reached. It is only just that they be assisted towards that end.

[51] By token of the same arguments, I cannot agree with the orders sought in encl 46. The crux of the respondents' application is that because time is of the essence of the consent order, the consent order should be rescinded and the first respondent wound up with the non-compliance of those terms.

[52] Aside from my views earlier on the matter of time for compliance, with respect, it is also my view that these orders would certainly go outside the purpose and meaning of 'implementation and giving effect' to the terms of the consent order. What distinguishes the petitioner's application from the respondents' is that the respondents' application seeks in effect, a 'rehearing or reopening of the case' — see *Kanawagi s/o Seperumaniam v Penang Port Commission*. That order is closed to the respondents in view of the consent order that the respondents had themselves reached. Enclosure 1, a petition under s 181 of the Companies Act 1965 has already been disposed of and it is

not open to the court countenance — see *Tenaga Nasional Bhd v Prorak Sdn Bhd* at p 492. Enclosure 46 is therefore dismissed.

[53] A single costs of RM5,000 is hereby awarded to the petitioner in relation to both applications.

Enclosure 34 allowed and encl 46 dismissed with costs.

Reported by Kanesh Sundrum